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Supreme Court, U.S.
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No. 00-1505

IN THE
Supreme Court of the United States

MONOGRAM CREDIT CARD BANK OF GEORGIA,
Petitioner,
v.
PATRICIA HEATON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Monogram Credit Card Bank of Georgia ("Monogram") respectfully files this Supplemental Brief to advise the Court of events that came to Monogram's attention after its Reply Brief had gone to the printer.

In her Brief in Opposition, respondent argued that Monogram's petition should be "denied as moot," in part because "the FDIC has sought to intervene in state court," and the grant of intervention would result in the case being "removed to federal court." Br. in Opp. 18. As Monogram argued in its reply, the petition is plainly not moot, and mere speculation that it might become so provides no basis for this Court to deny the petition. *See* Reply Br. 4-6. There is an additional reason to reject respondent's mootness concerns: the state court in Louisiana has denied the FDIC's motion to intervene. *See Heaton v. Monogram Credit Card Bank of Georgia*, Reasons for Judgment at 3 (Civ. Dist. Ct. May 18, 2001) (Supplemental Brief Appendix 5a).[1]

[1] The state court's opinion is dated May 18, 2001, but it was not received by Monogram until May 29, 2001, after the Reply Brief had been sent to the printer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENTAL APPENDIX

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO- 98-8275 **DIVISION "D"**
SECTION 16

PATRICIA HEATON

VERSUS

MONOGRAM CREDIT CARD BANK OF GEORGIA

FILED: _____ DEPUTY CLERK: _____

REASONS FOR JUDGMENT

These Reasons for Judgment are issued in connection with the Court's decision to deny the Federal Deposit Insurance Corporation's ("FDIC") Motion for Leave to File Petition in Intervention.

I. FACTS

This case has a complicated procedural history. For purposes of these Reasons for Judgment, the Court adopts the history provided by plaintiff, which was uncontested by FDIC or defendant.

II. DISCUSSION

The parties agree the FDIC's request for leave to intervene presents two issues: First, under Louisiana Code of Civil Procedure 1033 will the intervention, if granted, retard the progress of the action. Second, under Civil Procedure article 1091, does the FDIC have the right to intervene? The Court addresses both issues below.

It is in the Court's discretion to decide whether the FDIC's intervention will retard the progress of the action. *Charia v. Allstate Insur. Co.*, 635 So. 2d 370 (La. App. 4th Cir. 1994). The Court finds that the FDIC's intervention will substantially retard the progress of the action and, as a result, denies the motion. The case is already three years old, having been filed in May 1998. The case has been removed on two separate occasions to federal court, once in 1998 and again in 2000. Each time the federal court has remanded the case to this Court. Counsel for Monogram admitted at oral argument that a third removal will result if the intervention is granted. A third removal may lead to further jurisdictional litigation and additional delay.

Permitting the FDIC to intervene at this point and remove the case would severely disrupt the proceedings. The Court has entered a Scheduling Order, with the consent of the parties, setting a hearing in June 2001 on defendant's dispositive motion and another in July 2001 on plaintiff's Motion for Class Certification. The Court believes this expedited schedule is appropriate because the case has bounced back and forth between state and federal court for the past three years.

In denying the FDIC's motion under Louisiana Civil Code article 1033, the Court has also considered the possible

prejudice to the parties. On the one hand, the Court finds plaintiff would be greatly prejudiced by a third removal of the case.

On the other hand, the FDIC is not prejudiced by the denial of its motion. The FDIC had ample opportunity to intervene earlier in the case, but failed to do so. The FDIC could have intervened in September 1998 when it learned of the case. Yet the agency did not. Instead, it relied on Monogram to represent its interests. Similarly, the FDIC could have sought to intervene between November 1999 and November 2000 when the case was pending in this Court after the first remand. Yet the agency did not do so.

Denying the intervention will not prohibit the FDIC from participating in the case. Ms. Heaton has agreed the FDIC may participate as amicus curiae in these proceedings. Because the FDIC has an interest in advising the Court on how the federal preemption issue should be handled, the Court invites the agency to participate in this fashion. The FDIC was satisfied to appear amicus curiae in the Fifth Circuit to protect its administrative interests. It makes no sense that the FDIC is now unsatisfied with this approach.

The Court also denies the FDIC's motion because the Court agrees with Judge Barbier's observations that the FDIC's intervention is solely an attempt to divest this Court of jurisdiction. The FDIC will add nothing as a party. The federal court has twice concluded that jurisdiction is better vested in state court. Like Judge Barbier, the Court is disturbed by the assistance the FDIC has repeatedly provided Monogram in these proceedings. The Court refers to the comments made by Judge Barbier at a hearing in December 2000, which are included in the record of this matter.

In addition, the FDIC is not prejudiced by the denial of its motion because its interests are being adequately represented by Monogram. Both the FDIC and Monogram are advancing the same interpretation of federal law, namely that Ms. Heaton's claims are preempted.

Lastly, the FDIC is not prejudiced because it has an appeal pending in the Fifth Circuit. The FDIC is protecting its federal interests in that federal forum.

The Court also concludes the intervention should be denied under Louisiana Civil Code article 1091. The Fourth Circuit has set forth the test for determining whether a party has a right to intervene. In *Amoco Production Co. v. Columbus Gas Transmission Corp.*, 455 So.2d 1260, 1264 (La. App. 4th Cir.), *writ denied*, 459 So.2d 542 (La. 1984), the Fourth Circuit made clear that a party seeking to intervene must have a justiciable right in the litigation, and the right must be "so related to the facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights."

The Court finds the FDIC does not have the right to intervene as a party under the unique circumstances presented here. The FDIC is not seeking redress or relief against either party and consequently does not have a justiciable right that will be directly impacted by the case. The FDIC essentially wants to advise the Court on how the federal statutes at issue should be interpreted. This interest does not warrant the FDIC becoming a party in the case. The FDIC has already set forth its legal arguments as amicus curiae and the FDIC may continued to do so here. The FDIC will add nothing of substance as a party, except to give defendant the opportunity to remove the case for a third time. For the foregoing reasons,

Touro Synagogue v. Goodwill Indus., 96 So.2d 29 (La. 1957), the case relied on by the FDIC, is inapplicable.

For the reasons assigned above, the FDIC's Motion for Leave to File Petition in Intervention is DENIED.

NEW ORLEANS LOUISIANA, this 18th day of May, 2001.

/s/
JUDGE